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In The
Supreme Court of the United States
October Term, 1988

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BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of the State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana,

Petitioners,

vs.

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARK MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE, and HENRY A. DILLON, III,

Respondents.

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. The National Importance Of The Question Presented Justifies The Court's Immediate Consideration.

The fact that 42 states are affected by the Fifth Circuit's holding in the *Chisom* case justifies the Court's immediate consideration as to the applicability of Section 2(b) of the Voting Rights Act to state electoral judicial selection systems.

The respondents argue that consideration of this case by the Court at this time is premature and should await a trial on the merits. Louisiana contends that such a delay would be to shut the barn door after the horse has run away—not only in Louisiana but in the seven other states in which parallel suits have been brought, and, potentially, in all of the forty-two states where judges are elected. Phrased differently, this Court will be deprived of a meaningful opportunity to review the merits because a remedy will already be in place.

Relying upon the decision by the United States Court of Appeals for the Fifth Circuit in this case that Section 2 of the Voting Rights Act applies to judges, the district court in *Clark v. Edwards* has ordered the State of Louisiana to rewrite completely its system of electing trial, family court, and appellate judges by January 31st, 1989. If Louisiana fails to meet this deadline or if its plan is not accepted by the trial judge, he will himself fashion a new system. Pursuant to that court order, the Governor of Louisiana has appointed a commission for revision of the judiciary selection process and has stated that a special session of the legislature will be called in January to consider this question. If this Court does not agree to hear

the *Chisom* case, Louisiana faces the real possibility (indeed probability) that a new system will be adopted and put in place long before this Court holds whether any restructuring was actually necessary.

Arguing against immediate review in an *amicus* brief, the Solicitor General downplays the importance of this case, stating that there "have been very few complaints under Section 2 against judicial electoral systems." Brief at 5. In stark contrast to this position, the United States Attorney General has certified this case to be of general public importance. Actually, more than "very few complaints" are involved—indeed, eight states already face such challenges. In the Illinois suit, 201 state judges have been joined as parties.

If the question is of little significance, why have eight states filed *amici* briefs urging review by this Court? Why, also, did the United States file an *amicus* brief in the Fifth Circuit *after* the District Court had held for the State of Louisiana, and assert in brief page 1 "[s]ince this is the first court of appeals to address the issue, the United States has considerable interest in the case's outcome"? Why did the United States intervene in this case *after* the Fifth Circuit had vacated the injunction as imposed by the District Court? All of this activity on the part of the United States, including the filing of an *amicus* brief with this Court, underscores the importance of the issue posed in the petition for certiorari. Since the petition was filed, another suit has been filed in Louisiana, as anticipated in the petition for certiorari [page 9]. This third suit involves all of the judges in the State of Louisiana not covered by either the *Chisom* or *Clark* case, the Juvenile, Mu-

nicipal/City, Parish and Traffic Court judges. *Arnold et al. v. Roemer, et al.*, No. 88-3983, United States District Court for the Eastern District of Louisiana. Also, since the petition for certiorari was filed, another suit was filed on September 21st, 1988. *Marzuq A. Al-Hakim, et al. v. State of Florida*, 88-1416-CIV-T-10 "A", U.S.D.C. M.D. Fla, Tampa Division.

Guidance by this Court at this time is necessary to prevent uncertainty from plaguing states which elect judges. Such confusion is illustrated by the "on again, off again" status of the 1988 Louisiana Supreme Court election in the district involved in this case. On May 9th, 1988, the plaintiffs first moved to stop the October 1st, 1988 judicial election, filing a motion for injunction in the Fifth Circuit. After this was denied by that Court, the plaintiffs immediately sought an injunction by the district court. On July 7th, 1988, the injunction was granted and the election was enjoined. On July 26th, 1988, the injunction was partially lifted by the Fifth Circuit to allow qualifying, although no statement was made as to whether the election would ultimately be allowed. On August 3rd, 1988, the Fifth Circuit lifted the entire injunction after hearing arguments by the State, the plaintiffs, the incumbent Justice seeking reelection, his 1988 opponent, and the incumbent in the seat to be filled by election in 1990. The Court did impose an unprecedented "second chance" qualifying period. Only after an application for rehearing *en banc* was denied on September 14th, 1988, (two and one half weeks before the scheduled election) could the public know that there would in fact be a 1988 election.

Similar uncertainty has pervaded the elections for state trial and appellate judges in Louisiana in 1988. The

— plaintiffs in *Clark v. Edwards* sought to enjoin all judicial races scheduled for the October 1st, 1988 election. The district court granted an injunction in three opinions dated August 10th, 11th, and 15th, 1988. The district court then modified its order to allow qualifying. Despite the Fifth Circuit's ruling allowing the Louisiana Supreme Court election in *Chisom*, the *Clark* district court continued to enjoin the election. The Fifth Circuit reversed this injunction on September 7th, 1988. Only after an application for a stay [A-198] was denied by Justice Byron White on September 12, 1988, and by this entire Court on September 27th, 1988, (the latter only four days before the election) did the Louisiana public know that there would be 1988 elections.

Clearly, then, a decision by this Court at this time is vitally necessary to reduce uncertainty and confusion among the judiciary and populace of the forty-two states who have chosen to elect their judges. Indeed, the Solicitor General has virtually admitted the necessity of such guidance in an *amicus* brief, stating that the differing function of judges may influence whether a Section 2 violation has occurred and what the appropriate remedy will be. Brief at 10 n.8. If the Solicitor General is stating that the *Gingles* factors are or could be inappropriate, that issue should be resolved now before Louisiana and as many as 41 other states have scrapped their current system of electing judges.

II. Reliance On The Attorney General's Interpretation Of The Voting Rights Act Is Misplaced.

The respondents in brief, 22-23, suggest the infallibility of the Attorney General's interpretation of the Voting

Rights Act. The Attorney General's views of this statute, however, have been inconsistent. In *Thornburg v. Gingles*, 478 U.S. 30 (1986) the Solicitor General sided with the Attorney General of North Carolina and sought reversal of the district court's interpretation of Section 2 of the Voting Rights Act. In *Gingles, id* at 43, fn. 7, this Court stated:

> The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as *Amicus Curiae* 8, n.12, 24, n.49.

Now this same Solicitor General sides with the respondents in this matter concerning an interpretation of Section 2(b) of the Voting Rights Act and is now prepared to embrace the same legislative history that he renounced in the *Gingles* case. Brief of the United States as *Amicus Curiae*, 9-10. In fn. 7, 10, Senator Hatch's oft-quoted observation concerning "judicial districts" is mentioned. What has never been mentioned by any of the quoters of this language, including the Fifth Circuit in *Chisom*, is the fact that a judicial district is considered a geographic area by some states and both executive and legislative officers are elected from such districts. For instance, in Mississippi, the Highway Board and Public Service Commission are elected from Mississippi's Supreme Court Districts. §§ 9-1-1, 65-1-3, and 77-1-1, Mississippi Code of 1972 Annotated.

III. The Martin Decision Does Not Foreclose The Question Of The Applicability Of Section 2 Of The Voting Rights Act To A State Judicial Selection Process.

The respondents note that in *Martin v. Haith*, 477 U.S. 901 (1986), this Court summarily affirmed a district court decision that Section 5 of the Voting Rights Act applies to the state judiciaries. That section, however, does not use the crucial limiting term "representatives," a term with a plain meaning long construed by this Court Indeed, this Court has recognized a distinction between the judiciary and other branches of the government in summarily affirming a decision that the "one man, one vote" principle does not apply to the judiciary. *Holshouser v. Scott*, 409 U.S. 807 (1972). The district court decision in *Holshouser* noted the difference between election of the judiciary and "election of the representatives of the people—officials who make laws, levy and collect taxes, and generally manage and govern people." *Holshouser v. Scott*, 335 F. Supp. 928, 930 (M.D.N.C. 1971). Judges, on the other hand, "do not govern nor represent people nor espouse the cause of a particular constituency." *Id.* at 932; *accord, New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3 (1966).

In reality, neither the summary affirmance in *Martin* nor in *Holshouser* govern the issue presented in this case. Even if either constituted an instructive precedent, such a summary affirmance is "not of the same precedential value as would be an opinion of the Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *accord, Tully v. Griffin*, 429 U.S. 68, 74-75

(1976); *Richardson v. Ramirez*, 418 U.S. 24, 83 n. 27 (1974) (Marshall, Douglas, & Brennan, J., dissenting).

IV. The Experience Of The Courts With Section 5 Would Not Be Relevant In Determining Interpretation Of Section 2.

Section 2 of the Voting Rights Act, as amended, created a "results" test while the unamended Section 5 of the Voting Rights Act has always applied an "effects" test. The two sections serve entirely different purposes. Section 5 has a limited applicability—only to specific targeted states where voting statutory changes may not occur without Justice Department approval [preclearance]. Section 2, however, applies to the voting statutes of all states as written and applied before and after the 1982 amendment. A Section 2 violation must be established through a full judicial evidentiary hearing, in which the plaintiff carries the burden of proof. A Section 5 determination is made initially administratively, mostly through correspondence. If the Section 5 change is found objectionable, then the finding is subject to judicial review in the United States District Court for the District of Columbia, with the state bearing the burden of proof.

In commenting on the comparison of the "results" test [Section 5] with the "effects" test [Section 2], the Senate Report on the Voting Rights Act, S. Rep. No. 1992, 97th Cong., 2d Sess. (1982) stated:

> "The confusion introduced by the results test is illustrated somewhat by the near-total disagreement as far as one of the most basic questions involved in the analysis: Does the 'results' test proposed in section 2 mean the same thing as the 'effects' test in section 5? Despite the fundamental importance of this mat-

> ter, there has been disagreement among witness after witness on this."

Id. at 31.

> "During the course of both the House and Senate hearings on the Voting Rights Act, approximately half of the witnesses who discussed this issue claimed that the results test in section 2 was similar or identical to the effects test in section 5, and hence that the judicial history of interpretation under section 5 was relevant; the other half argued that it meant something substantially or totally dissimilar."

Id. at 32.

Interestingly, Julius L. Chambers, one of the counsel for the respondents herein testified concerning the difference between Section 2 and Section 5:

> Question: What is the relationship between the results test in section 2 and the effects test in section 5?
>
> Chambers: They are not the same test . . .
>
> Question: In other words, the experience of the courts with section 5 would not be relevant in determining how section 2 is likely to be interpreted?
>
> Chambers: That is correct.

Id. at 31-32.

Similarly, Professor Archibald Cox observed:

> If you mean the effects test as interpreted by the courts with regard to section 5, I think that is considerably different from the results test in section 2.

Id. at 32.

Forewarned by these differing opinions from congressional witnesses as to the applicability of the Section 2 "results" test, the Fifth Circuit should have turned to

the plain meaning of the word "representatives" as used in the Statute. Section 5 does not use the term "representatives." Indeed the term "representatives" appears nowhere in the Voting Rights Act except in Section 2(b). If Congress had intended "representatives" to mean "elective officials" (which would have included judges) it could easily have said so. Using the term "representatives" demonstrates Congress meant something other than all elected officials. By enlarging the meaning of the word "representatives" to include state court judges, the Fifth Circuit was not interpreting the words of the Statute, but rather was amending the language to make the Statute say something else. Congress made no attempt to define the word "representatives." "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. [Citations omitted]" *Perrin v. United States,* 444 U.S. 37, at 42 (1979). As this Court has counseled, "we are not at liberty to construe language so plain as to need no construction, [fn. citations omitted] or to refer to committee reports where there can be no doubt of the meaning of the words used [fn. citations omitted]. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, at 89 (1925).

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CONCLUSION

The question presented for the Court's consideration impacts forty-two states. It would be difficult to envision a question of greater importance to these affected states than the continued viability of their judicial systems. The resolution of the question presented needs to occur now.

All of the above and foregoing is thus respectfully submitted.

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